Table of Contents.

Questions presented	1
Statement	1
Summary of argument	7
Argument	8
The dismissal by the Court of Appeals of the Board's petition for enforcement of its order was a proper exercise of the discretion vested in that Court by Section 10(e) of the Act	8
a) The Court of Appeals had the discretion under Section 10(e) of the Act to dismiss the Board's petition on the basis of facts in the supplemented record before it	9
b) In dismissing the Board's petition for enforcement the Court of Appeals properly exercised its discretion	11
c) The authorities cited by the Board do not require reversal of the decision of the Court of Appeals dismissing the Board petition for enforcement of its order	23
d) The Court of Appeals dismissal of the Board's petition under the particular circumstances of this case does not frustrate the purpose of Section 7 of the Act	27
Conclusion	28

Table of Authorities Cited.

Cases.

General Engineering, Inc. v. National Labor Relations Board, 311 F. 2d 570	6, 7, 8, 14, 15, 24, 25

General Electric Co. v. National Labor Relations Board, 400 F. 2d 713, cert. den. 394 U.S. 904 23n.
Golden v. Zwickler, 394 U.S. 103 20
Gray v. Sanders, 372 U.S. 368 25, 26n.
Hall v. Beals, 90 S. Ct. 200 20, 28
Hecht Company v. Bowles, 321 U.S. 321 19
Marsh Supermarkets, Inc., 140 N.L.R.B. 899 24
National Labor Relations Board v. Brown Food Store, 380 U.S. 278 13
National Labor Relations Board v. Clark Bros. Co., Inc., 163 F. 2d 373 16, 24
National Labor Relations Board v. Jones & Laughlin Steel Corporation, 331 U.S. 416 15
National Labor Relations Board v. Marsh Supermarkets, Inc., 327 F. 2d 109, cert. den. 377 U.S. 944 23, 25
National Labor Relations Board v. Metalab-Labcraft, 367 F. 2d 471 23, 25
National Labor Relations Board v. Mexia Textile Mills, Inc., 339 U.S. 563 25
National Labor Relations Board v. Oregon Worsted Co., 96 F. 2d 193 25
National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261 8, 24
National Labor Relations Board v. Pittsburgh Steamship Company, 340 U.S. 498 12
National Labor Relations Board v. Pool Manufacturing Co., 339 U.S. 577 25
National Labor Relations Board v. Rippee, 339 F. 2d 315 25
Southern Steamship Co. v. National Labor Relations Board, 316 U.S. 31 21n.

United States v. Concentrated Phosphate Export Association, 393 U.S. 199 25, 26n.

United States v. Trans-Missouri Freight Association, 166 U.S. 290 25, 26n.

Universal Camera Corporation v. National Labor Relations Board, 340 U.S. 474 10

Walling v. Helmerich & Payne, Inc., 323 U.S. 37 25, 26n.

Walling v. James V. Reuter, Inc., 321 U.S. 671 25, 26n.

Wirtz v. Local 153, Glass Bottle Blowers Association of the United States and Canada, AFL-CIO, 389 U.S. 463 9, 26

STATUTES, ETC.

U.S. Constitution, First Amendment 20

Labor-Management Reporting and Disclosure Act, Title IV 26

Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 534, 29 U.S.C. § 482 (c), Section 402(c) 9, 26n.

National Labor Relations Act of 1935 10n.

National Labor Relations Act, Section 7 27

National Labor Relations Act

Section 8(a)(1) 2, 3, 4, 16, 23, 24

Section 8(a)(2) 8, 16

Section 8(a)(3) 16, 23

Section 8(a)(4) 16

Section 8(a)(5) 16, 25

National Labor Relations Act, Section 8(c) 4, 6, 20

National Labor Relations Act, Section 10(e), 49 Stat. 454, 61 Stat. 148, 29 U.S.C. § 160(e) 4, 7, 8, 9, 15, 17, 22, 26

MISCELLANEOUS.

Brown, Chief Judge, U.S. Court of Appeals, Fifth Circuit, Address to the section of Labor Relations Law, American Bar Association, August 6, 1968 22n.

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Supreme Court of the United States.

OCTOBER TERM, 1969.

No. 440.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
RAYTHEON COMPANY ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RAYTHEON COMPANY.

Question Presented.

Whether, on the basis of the record in this case, the Court of Appeals acted within its authority in dismissing a petition for enforcement of a National Labor Relations Board order.

Statement.

Raytheon Company, a Delaware corporation, is an electronics manufacturer with facilities in several states. As of the date of the hearing in this proceeding before a trial

examiner of the National Labor Relations Board (referred to herein as the "Board"), Raytheon employees in Massachusetts, Rhode Island, Connecticut, Oxnard and South San Francisco, California, were represented by unions. All of the bargaining units at these facilities had been organized peacefully and had never had a strike (Tr. p. 236). Approximately nineteen petitions for Board elections at Raytheon plants had been filed during the period 1960-1966 and except for the instant case, no objections had been filed with respect to Raytheon's preelection conduct (Tr. pp. 237-238).

The instant proceeding is based upon events arising at Raytheon's plant located in Mountain View, California, which is engaged in the design, development and manufacture of semiconductor products and solid state devices (A. 9). Upon a petition filed by the International Union of Electrical, Radio and Machine Workers, AFL-CIO (referred to herein as the "IUE"), the Board conducted a representation election at Raytheon's Mountain View plant on February 4, 1965. A majority of the employees in the bargaining unit rejected union representation.[1] Subsequently the IUE filed a petition to set aside the election and unfair labor charges (A. 10). The objections and the unfair labor practice charges were consolidated for hearing before a Board trial examiner (A. 8-9). The trial examiner issued a decision recommending that the Board set aside the election and issue an order finding that Raytheon had committed certain unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act, as amended (referred to herein as the "Act") (A. 20-24). The decision stated that Raytheon's violation of Section 8(a)(1) was "in major part" through speeches made to employees in eight separate groups two days before the election by Ray-

[1] The tally of ballots was: 301 for no union; 161 for IUE; 54 for IBEW, an intervenor (A. 10).

theon's Vice President—Industrial Relations, Robert Hennemuth, and also through statements allegedly made in two conversations within "the week or so" preceding the election between first line supervisor Nicola Krest and employee Carol Alvarado [2] (A. 15-17). The recommendation that the election be set aside was based on these two unfair labor practice findings and an additional ground which the Board found unnecessary to resolve (A. 19). In affirming its trial examiner's decision, the Board found that the Hennemuth speeches and Krest-Alvarado conversations violated Section 8(a)(1) and set the election aside solely on those grounds (A. 3-4).

In a second election conducted by the Board on June 23, 1967, the employees again rejected union representation [3] (A. 30-31). The IUE filed a petition to set aside that election but did not file unfair labor practice charges (A. 31). On September 27, 1968, the Board issued an order setting aside the second election and directing a third election (A. 31). There is nothing in the record before this Court with respect to the specific grounds upon which the second election was set aside.[4]

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[2] The trial examiner's conclusion that the principal violation was through the Hennemuth speeches is also indicated by his statement that Krest's remarks to Alvarado took on "added emphasis and significance" from the Hennemuth speeches (A. 11).

[3] The final tally of ballots was: 418 for no union; 312 for IUE (A. 30-31).

[4] On pages 5 and 9 of its brief the Board refers to the grounds on which the second election was set aside as "further acts of interference" and "new acts of misconduct." In view of the absence of evidence relating to the specific conduct involved, the fact that Raytheon had no right of appeal and the absence of unfair labor practice charges relating to Raytheon's conduct prior to the second election, no adverse inferences should be drawn from the setting aside of the second election.

A third election was conducted on November 1, 1968, and the employees again rejected representation by the IUE [5] (A. 32-33). On November 12, 1968, the Board's regional director certified the results of the election thus terminating the representation proceeding (A. 34).

On February 8, 1968, the Board, pursuant to Section 10(e) of the Act, petitioned the United States Court of Appeals, Ninth Circuit, for enforcement of its unfair labor practice order (A. 25-26). Subsequent thereto the IUE filed a petition in the same Court to review that portion of the Board's order dismissing the IUE's motion to amend the complaint to include further unfair labor practice allegations (A. 4, fn. 2). These two petitions were consolidated. Briefs were filed and on January 7, 1969, oral argument was held.[6]

In its brief Raytheon set forth in detail its position that it had not violated Section 8(a)(1) either through the Hennemuth speeches or the Krest-Alvarado conversations. With respect to the allegations relating to the Hennemuth speeches, Raytheon relied on authorities holding that similar statements were protected by the free speech provision in Section 8(c) of the Act (Raytheon Brief, 9th Cir. pp. 13-25). Specifically, Raytheon set forth references to other portions of the speech to show that those portions cited by

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[5] Final tally of ballots was 258 for no union; 204 for IUE (A. 32-33).

[6] Although Raytheon's motion to intervene in the proceeding initiated by the IUE's petition was granted by the Court, no such motion was made by the IUE with respect to the proceeding initiated by the Board's petition for enforcement. The IUE's counsel, however, did participate in the argument on the merits with respect to the petition for enforcement.

the trial examiner were taken out of context[7] (Raytheon Brief, 9th Cir. pp. 6-11). With respect to the reference to sick leave, referred to on page 3 of the Board's brief before this Court, it was pointed out that other portions of the speech and the fact that the sick leave issue was raised initially by the employees demonstrated that the quoted statements did not constitute a threat against union representation but merely pointed out certain economic circumstances in the same manner in which they might have been made at the bargaining table (Raytheon Brief, 9th Cir. pp. 10, 24). The brief also recited the specific circumstances under which the "improved grievance procedure" issue arose and demonstrated that such characterization was an elaborate expansion of remarks made by Hennemuth in response to questions from employees to the effect that it

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[7] For example, at the outset of the speech to the first group, Hennemuth stated:

> "And we recognize that this election, which is going to be held Thursday, is strictly your business but we do feel obligated as the management of the company to make sure that you have the facts that are involved as we see them and then you make your own choice and vote whichever way you please and I promise you on behalf of the company, first of all we won't know how you vote, but even if we did there will be absolutely no recrimination of any kind. This is a free election in the good old American tradition and we heartily approve of the whole idea. It is the best way I know of to settle any kind of a matter that is a public issue, if you will." (Resp. Ex. 3, p. 1, lines 21-30).

Similar statements were made elsewhere in the speeches. See Resp. Ex. 3, p. 4, lines 5-7; Resp. Ex. 4, p. 3, lines 10-11; Resp. Ex. 5, p. 5, lines 29-31, p. 12, lines 28-29, p. 13, lines 12-19; Resp. Ex. 6, p. 2, lines 3-15, p. 9, lines 2-9, 26-32, p. 10, lines 1-4; Resp. Ex. 7, p. 1, lines 20-26, p. 2, lines 17-23, p. 3, lines 4-18, p. 13, lines 7-15; Resp. Ex. 8, p. 2, lines 31-32, p. 3, lines 1-3, 17-27, p. 11, lines 1-8, p. 16, lines 1-3; Resp. Ex. 9, p. 1, lines 5-10, p. 3, lines 1-13, p. 9, lines 9-22.

was one of the functions of his office to cure inequities "that involved human beings anywhere in the Company" (Raytheon Brief, 9th Cir. pp. 10-11, 24-25).

With respect to the Krest-Alvarado conversations, Raytheon argued in its brief that no proper credibility findings were made to resolve the conflict in testimony between Krest and Alvarado; that in any event Krest's alleged statements were lawful and protected by Section 8(c); and that the incident did not reflect a general plan of coercion by Raytheon and must be considered de minimis (Raytheon Brief, 9th Cir. pp. 3, 25-31).

Following arguments by counsel for the IUE and the Board relating to the merits of the petition for enforcement, Raytheon's counsel at the outset of his argument on the merits referred the Court to its decision in *General Engineering, Inc.* v. *National Labor Relations Board,* 311 F. 2d 570 (9th Cir. 1962), and pointed out that the results of the third election had been certified by the Board. The Court gave counsel leave to supplement the record and move dismissal of the petitions (A. 48). Thereupon, Raytheon filed a motion to dismiss dated January 16, 1969, and submitted as part of said motion the tally of ballots and certification of results of the third election (A. 29-36).

Both the Board and the IUE subsequently submitted memoranda in opposition to the motion to dismiss (A. 37-47). On February 19, 1969, the Court issued its decision granting the motion to dismiss (A. 48-49). Judgment was entered on the same day dismissing both the Board's petition for enforcement and the IUE's petition for review (A. 49-50). In an order dated May 8, 1969, petitions for rehearing filed by the Board and the IUE were denied and a suggestion for rehearing en banc was rejected (A. 51).

Summary of Argument.

Section 10(e) of the Act vests in the Courts of Appeals considerable discretion in deciding whether to enforce Board orders.

This Court should not reverse a decision of a Court of Appeals dismissing a Board petition unless abuse of discretion can be shown. Dismissal of the petition in the instant case was a proper exercise of the Court of Appeals' discretion.

Although the Court used the term "moot," the opinion and judgment reflect that the dismissal was not based on mootness in its classical sense, but rather on the determination that, under the circumstances, enforcement of the order would have too minimal an impact on private or public interest to justify exercise of the judicial function. The significant facts upon which the Court's decision was based were that alleged unfair labor practices, the sole ground on which the election was set aside, were indigenous to the representation case and of a marginal nature. By fully considering the merits of certain alleged unfair labor practices in *General Engineering, Inc.* v. *National Labor Relations Board,* 311 F. 2d 570 (9th Cir. 1962), the Ninth Circuit demonstrated that it would not dismiss summarily, upon the holding of a subsequent certified election, unfair labor practice violations not indigenous to the representation case.

The merits of the alleged unfair labor practice presented issues related to statutory and constitutional protections of free speech and the possibility that similar violations would occur in the future was too minimal to require the Court to give full consideration to the merits. The decision was appropriate for court rather than agency determination. If the Courts of Appeals do not have sufficient discretion to take action, such as that in the instant case, dockets could be inundated with trivial matters.

The three Courts of Appeals decisions cited by the Board as being contrary to that of the Court below involved the exercise of discretion under essentially different facts and circumstances. In two cases the unfair labor practices respondent sought to have dismissed on the basis of a subsequent certified election were not indigenous to the representation case and in the third the allegedly unlawful speech was given to other employees in addition to those participating in the subsequent certified election.

In *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 (1938), the unfair labor practice which respondent contended was mooted by a subsequent certified election was a violation of Section 8(a)(2) which was not indigenous to the representation case.

The decision of the Court of Appeals does not conflict with the cases cited by the Board for the principle that voluntary compliance with a Board order is not a defense to a petition for enforcement. Subsequent to *General Engineering, Inc.* v. *National Labor Relations Board*, 311 F. 2d 570 (9th Cir. 1962), the Ninth Circuit has reaffirmed its acceptance of this principle.

There is no showing on this record that the organizational rights of employees are frustrated by the decision of the Court of Appeals. The Court could conclude from the record that the public interest would best be served by dismissing the petition.

Argument.

The Dismissal by the Court of Appeals of the Board's Petition for Enforcement of its Order was a Proper Exercise of the Discretion Vested in that Court by Section 10(e) of the Act.

a) The Court of Appeals Had the Discretion under Section 10(e) of the Act to Dismiss the Board's Petition on the Basis of the Facts in the Supplemented Record before It.

The underlying issue before this Court is the extent to which Courts of Appeals have the authority to exercise the discretion granted them by the Act.

The role in reviewing unfair labor practice orders assigned to the Courts of Appeals by Congress is set forth in Section 10(e) of the Act which provides in relevant part that:

> ". . . the court . . . shall have power to . . . make and enter a decree enforcing, modifying . . . or setting aside in whole or in part the order of the Board. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari . . ." 49 Stat. 454, 61 Stat. 148, 29 U.S.C. § 160(e).

Unlike the Labor-Management Reporting and Disclosure Act of 1959, Section 402(c) [8] which requires the Court to declare an election void upon appropriate establishment by the Secretary in court that there may have been a violation, Congress specifically made the enforcement language in the National Labor Relations Act permissive. Cf. *Wirtz v. Local 153, Glass Bottle Blowers Association of the United States and Canada, AFL-CIO*, 389 U.S. 463, 474 (1968). The words "the court shall make and enter a decree" were ex-

[8] 73 Stat. 534; 29 U.S.C. § 482 (c).

pressly considered and rejected by Congress [9] in favor of the words "the court shall have power to make and enter a decree." The language used clearly reflects an intent to confer upon the Courts of Appeals not only the power to enforce, modify or set aside but also the power summarily to dismiss a petition for enforcement.

The fact that Board orders are not self-enforcing further reflects a congressional intent to give the Courts of Appeals considerable responsibility with respect to the enforcement of the orders. This Court has on several occasions noted the extent of this responsibility. In *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U.S. 474, 490-491 (1951), the Court described the responsibility of the Courts of Appeals in enforcing Board orders as follows:

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that

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[9] S. 1958, 74th Cong. 1st Sess. as reported, 4th Senate Print shows the adoption of House Amendment 16 as follows:

> ". . . the court . . . shall have power . . . and (16) ~~shall~~ *to* make and enter a decree enforcing, modifying . . . or setting aside in whole or in part the order of the Board . . ." Legislative History of the National Labor Relations Act of 1935, compiled by the National Labor Relations Board, U.S. Govt. Printing Office, 1949, p. 3246.

S. 1958 with these changes adopted was enacted as the National Labor Relations Act of 1935 on July 5, 1935, *Ibid*, pp. 3270, 3276.

House Report No. 1371 on S. 1958, 74th Cong., 1st Sess. describes the effect of House Amendment 16 as follows:

> "House amendment no. 16 was accepted in the conference agreement as conforming to the language of the Federal Trade Commission Act, *in using the language of authorization rather than mandatory language* in empowering the court to enter the appropriate decree." (Emphasis added.) Legislative History of the National Labor Relations Act of 1935, compiled by the National Labor Relations Board, U.S. Govt. Printing Office, 1949, p. 3257.

courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.

. . . . . .

"Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

b) In Dismissing the Board's Petition for Enforcement the Court of Appeals Properly Exercised its Discretion.

On certiorari this Court should not reverse the decision of the Court of Appeals unless that Court has abused its

discretion even if under the circumstances this Court concludes that the merits of the alleged unfair labor practice should have been fully reviewed. In *National Labor Relations Board* v. *Pittsburgh Steamship Company*, 340 U.S. 498, 502-503 (1951), this Court expressed the applicable standard of review, as follows:

> "Were we called upon to pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders.
>
> . . . . . .
>
> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' *Federal Trade Comm'n* v. *American Tobacco Co.*, 274 U.S. 543, 544 [47 S. Ct. 663, 71 L. Ed. 1193]."

The issue before the Court is not one on which deference to the Board's special competence is appropriate, but is rather an exercise of the judicial function of determining

whether circumstances arising after issuance of an order render its enforcement inappropriate. The limits of the Board's expertise were described in *National Labor Relations Board* v. *Brown Food Store,* 380 U.S. 278, 290-292 (1965), as follows:

> "It is argued, finally, that the Board's decision is within the area of its expert judgment and that, in setting it aside, the Court of Appeals exceeded the authorized scope of judicial review. This proposition rests upon our statement in *Buffalo Linen* that in reconciling the conflicting interests of labor and management the Board's determination is to be subjected to 'limited judicial review.' 353 U.S., at 96 [77 S. Ct. 643]. When we used the phrase 'limited judicial review' we did not mean that the balance struck by the Board is immune from judicial examination and reversal in proper cases. Courts are expressly empowered to enforce, modify or set aside, in whole or in part, the Board's orders, except that the findings of the Board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. National Labor Relations Act, as amended, §§ 10(e), (f), 29 U. S. C. §§ 160(e), (f) (1958 ed.). Courts should be 'slow to overturn an administrative decision,' *Labor Board* v. *Babcock & Wilcox Co.,* 351 U. S. 105, 112 [76 S. Ct. 679, 100 L. Ed. 975], but they are not left 'to "sheer acceptance" of the Board's conclusions,' *Republic Aviation Corp.* v. *Labor Board,* 324 U. S. 793, 803 [65 S. Ct. 982, 89 L.Ed. 1372]. Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such

> review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions. Of course due deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole. But where, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, '[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' *American Ship Building Co.* v. *Labor Board, post* at 318 [85 S. Ct., at 967]." (Footnote omitted.)

The instant case comes before this Court without an opinion by the Court of Appeals on the merits of the Board's petition for enforcement of its unfair labor practice order. The Court of Appeals granted Raytheon's motion to dismiss the Board's petition on the authority of its prior decision in *General Engineering, Inc.* v. *National Labor Relations Board*, 311 F. 2d 570 (9th Cir. 1962). Since this motion was not made until after the case had been briefed and orally argued on the merits, the Court of Appeals did have the opportunity to review the entire record in the case. The judgment specifically states that the "Cause came on to be heard *on the Transcript of the Record from the National Labor Relations Board* and on motion of respondent for dismissal of petition to enforce and was duly submitted" (A. 49). (Emphasis supplied.)

Although *General Engineering Inc.* v. *National Labor Relations Board*, 311 F. 2d 570 (9th Cir. 1962) did describe unfair labor practices related to a representation case as

being rendered "moot" by a certification in the representation case, neither that case nor the instant case should be regarded as having been decided on the basis of "mootness" as that term is used in its classical sense. Generally a case is not moot if issues remain in controversy for decision by the court. The Ninth Circuit's decision in both cases should be construed as a determination, in the exercise of the discretion vested in the Court by Section 10(e) of the Act, that on the basis of all of the circumstances, including the subsequent certification, enforcement was inappropriate. In *General Engineering* the Ninth Circuit relied on a passage from *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 331 U.S. 416, 428 (1947), that clearly indicates that the Court of Appeals does have discretion to evaluate the impact of changing circumstances upon a Board order.[10] In the instant case both the fact that the Court did have the opportunity to evaluate the merits and its reference in the judgment to the fact that the case had been submitted upon the transcript indicate that the determination was made upon the entire record and not upon an abstract concept relating to mootness.

In *General Engineering, Inc.* v. *National Labor Relations Board*, 311 F. 2d 570, 572 (9th Cir. 1962) the Court did not rule that the Board's petition to enforce an unfair labor practice order was rendered moot in its entirety by

[10] "When circumstances do arise after the Board's order has been issued which may affect the propriety of enforcement of the order, the reviewing court has discretion to decide the matter itself or to remand it to the Board for further consideration. For example, where the order obviously has become moot, the court can deny enforcement without further ado; but where the matter is one involving complicated or disputed facts or questions of statutory policy, a remand to the Board is ordinarily in order." *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 331 U.S. 416, at 428.

a subsequent certification but only "*all portions of the order under review which relate to the representation case.*" (Emphasis supplied.) In that case the unfair labor practice found to be moot consisted of statements in preelection speeches and literature. The Court proceeded to adjudicate on the merits issues in the same case relating to an alleged violation of Section 8(a) (1) involving discharge of a supervisor and alleged violations of Section 8(a) (3) involving discharge of two employees. By adjudicating those unfair labor practices on the merits the Court clearly indicated that only Section 8(a) (1) violations "related" to the representation case would be rendered moot by a subsequent certification.

Violations of Sections 8(a) (2) (unlawful domination of a labor union); 8(a) (3) (unlawful discrimination to encourage or discourage membership in a labor union); 8(a) (4) (unlawful discrimination against an employee because of filing of a charge or giving testimony under the Act); and 8(a) (5) (unlawful refusal to bargain) are independent of any representation case and should not be rendered moot by a subsequent certification. Even violations of Section 8(a) (1) with a potential impact beyond the representation case could be regarded as appropriate for full determination on the merits. For example, maintenance of an allegedly unlawful no-solicitation clause, such as that involved in *National Labor Relations Board* v. *Clark Bros. Co., Inc.*, 163 F. 2d 373 (2d Cir. 1947), might well be considered not to have been rendered moot by a subsequent certification since such a violation has a continuing impact which could extend beyond a certification. Particularly flagrant violations of Section 8(a) (1) might also have a potential impact extending beyond a subsequent certification and thus require full consideration on the merits and enforcement of the Board order.

The record in the instant case demonstrates that the alleged unfair labor practices were solely related to and inseparable from the election proceeding. The Hennemuth speeches were made two days prior to the election for the express purpose of presenting to the employees Raytheon's position with respect to the forthcoming election (A. 10-17). The Krest-Alvarado conversations between a first line supervisor and a single employee in a unit of more than 500 occurred a week or so prior to the election; were initiated by campaign-related events; and involved alleged remarks directly related to the campaign (A. 10, 11). These alleged unfair labor practices were the sole ground on which the election was set aside. Moreover, despite the conclusionary characterizations of Raytheon's conduct by the Board, the alleged unfair labor practices could have been regarded by the Court of Appeals on the basis of the briefs and argument, and, certainly on the basis of the transcript, as being marginal in nature.

Where, as here, the alleged unfair labor practices are related to the representation case, the Court of Appeals, in the exercise of its discretion under Section 10(e) of the Act, could conclude that the unfair labor practice case retained insufficient practical significance to justify full consideration on the merits. Despite the Board's efforts to characterize in broad terms the conduct in question, the Hennemuth speeches and the Krest-Alvarado conversations were relevant only to the particular representation proceeding which commenced with the filing of the petition by the IUE on January 4, 1965, and terminated with the certification of November 12, 1968. If issued, the only genuine value of the order would have been to advise the employees, before they exercised their right to vote in the particular proceeding, that the conduct in question constituted an unfair labor practice. When the representation proceeding terminated, the practical necessity for the

Board's order dissolved. An election had been held under proper circumstances without the order.

The significance of this case is its insignificance. The real issue in the case relates to the extent to which the Courts of Appeals can exercise control over the types of cases which must be adjudicated on the merits. Stated in other words, does the Act require that the Courts of Appeals must consider fully the merits of every Board petition for enforcement of an unfair labor practice order, regardless of how insignificant an impact enforcement would have on public or private interests?

If this question is answered in the affirmative and the Board's position as set forth in its brief is accepted, neither compliance nor changing circumstances would justify refusal of a Court of Appeals to grant full consideration on the merits of a Board petition for enforcement of an unfair labor practice order no matter how trivial the offense charged. The logical extension of the Board's position is that it would be entitled to such consideration of a petition for enforcement even where the employer complied in full with an order relating to preelection conduct and in a subsequent election the union was selected as bargaining representative. Whether or not enforcement would be sought in such a case, the Board's position is that it, and not the Court of Appeals, would be the arbiter in deciding whether the petition may be dismissed by the Court of Appeals.

To concede to the Board that it is entitled to full consideration on the merits of unfair labor practices even when changing circumstances render impact of the order insignificant, such as in this hypothetical case, would indeed frustrate congressional intent. If Congress had intended for the Board to have complete control over the enforcement of its orders, the Act would have provided for self-enforcement. Assuming, contrary to the Board's position,

that its petition for enforcement would be properly dismissed if the employer had complied with the order and the Union won the election, the question as to whether the circumstances of the case at bar rendered the proceeding appropriate for summary dismissal is essentially one of degree, which is within the discretion of the reviewing court. *Hecht Company* v. *Bowles,* 321 U.S. 321 (1944).[11]

The Board's argument that the position of the Court of Appeals frustrates the protection of future organizational rights ignores the evident fact that, if the order is to have any practical effect in protecting organizational rights, it must be enforced during the representation proceeding in which it arose. If the Board is concerned that a new election will be held under unsatisfactory conditions, the Board —not the employer—can defer the election and expedite its enforcement effort. Indeed its own decision orders the regional director to conduct a new election "at such time as he deems that circumstances permit the free choice of a bargaining representative" (A. 6). Having certified the election results and terminated the representation case, the Board by continuing to seek enforcement of its order is requesting the Court of Appeals to divert its energies from the vital issues involved in other litigation in order to resolve what is, for all practical purposes, an academic question. Whether or not the fact that the Board is seeking a permanent order has technically kept the unfair labor practice proceeding alive, the Court of Appeals has jurisdiction to determine that the minimal impact of an order of this nature does not justify full consideration of the case on its merits.

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[11] As was said at page 329: "A grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made."

The central issue with respect to the merits of the Board's unfair labor practice findings, as briefed and argued before the Court of Appeals, was whether statements in the Hennemuth preelection speeches and the Krest-Alvarado interviews were protected by the guarantees of free speech in Section 8(c) of the Act and the First Amendment. Full consideration of the merits of this case would require resolution of issues related to statutory and constitutional protection of free speech. This Court has consistently stated that Federal Courts do not have jurisdiction to resolve academic questions, particularly those involving constitutional issues. *Hall* v. *Beals*, 90 S. Ct. 200 (1969); *Golden* v. *Zwickler*, 394 U.S. 103 (1969). Even if, as the Board contends, it is seeking an order to enjoin such conduct in the future, the case can be moot, if the issues remaining are too minimal to justify exercise of judicial power. In *Golden* v. *Zwickler*, 394 U.S. 103 (1969), plaintiff was seeking a declaratory judgment against the district attorney, holding that a law prohibiting distribution of anonymous literature in connection with an election campaign was an unconstitutional limitation on the right of free speech. The complaint had alleged that the plaintiff intended to continue to distribute such literature in connection with election campaigns of a particular congressman. This Court held that the fact that the congressman in question resigned from the House of Representatives to accept a position as a state judge with a tenure of fourteen years rendered moot plaintiff's action for declaratory judgment. Yet, in *Golden* v. *Zwickler*, even though the congressman had resigned there was the possibility that if the congressman did not personally run for office in plaintiff's district, his successor or others would and plaintiff would again wish to distribute anonymous literature. The need for declaratory judgment in *Golden* v. *Zwickler* appears to be no more remote than the Board's need for enforcement of its order in this case.

A respected commentator in the field of administrative law has cautioned against the abdication by courts to administrative agencies of the traditional judicial function.[12] Agencies, such as the Board, staffed by individuals concentrating their time and effort upon problems arising in a particular field of specialization, are not in the same position as the courts to balance competing interests.[13]

As the commentator stated:

> "An agency is not an island entire of itself. It is one of the many rooms in the magnificent mansion of the law. The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law; the law as it is found in the statute at hand, the statute book at large, the principles and conceptions, of the 'common law,' and the ultimate guarantees associated with the Constitution. Thus in the review of administrative actions a court may appeal to criteria of validity which have no specific locus in the statute." [14]

In reviewing the petition for enforcement in the instant case the Court could consider whether the subsequent certification would render an already trivial case so insignifi-

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[12] Jaffe, Judicial Control of Administrative Action (1965), pages 575-592.

[13] See *Southern Steamship Co.* v. *National Labor Relations Board,* 316 U.S. 31 (1942) where a Board order requiring an employer to reinstate seamen who had engaged in what the Board concluded was a strike to protect unfair labor practices was reversed by this Court on the ground that the strike violated the Mutiny Act.

[14] Jaffe, Judicial Control of Administrative Action (1965), page 590.

cant as to justify dismissal of the petition without full consideration on the merits of alleged unfair labor practices. There is a compelling reason why Courts of Appeals should have the right to determine that in some cases enforcement should be denied even without full consideration of the merits. In the interests of sound judicial administration the Courts of Appeals must have some basis for avoiding full consideration on the merits of insignificant, trivial cases with minimal impact on public or private interests. In recent years increasing attention has been given to the crowded state of the dockets before the Courts of Appeals. Noted jurists have called the attention of members of the bar to this problem.[15] The Board's construction of Section 10(e) in such a manner as to deprive the Courts of Appeals of the authority to exercise their discretion to dismiss summarily trivial cases which should not be consuming the time of the Courts, will make no contribution toward easing the problem.

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[15] "In the Courts of Appeals there has been a major increase in filings with the resultant increase in the number of pending cases. In only two years the number of pending appeals increased from 2,900 to 3,900, a rise of more than 1/3 in the number." Address of Hon. Earl Warren, Chief Justice of the United States, to the annual meeting of the American Law Institute, May 20, 1964. 35 F.R.D. 181, 184 (1964).

"What you don't realize is, perhaps that in the last six years of volume of appeals in the United States Court of Appeals across the country has risen well over 100 percent and the backlog has increased 300 percent." Address of Hon. John R. Brown, Chief Judge, United States Court of Appeals, Fifth Circuit to the Section of Labor Relations Law, American Bar Association, August 6, 1968. Report of the Section of Labor Relations Law, Section III, "The Rat Race, The Human Race and The Court House Race," p. 183 (1969).

See also Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 Harv. L. Rev. 542 (1969).

c) The Authorities Cited by the Board do Not Require Reversal of the Decision of the Court of Appeals Dismissing the Board Petition for Enforcement of its Order.

The three decisions of other Courts of Appeals holding that a subsequent election did not render moot a proceeding for enforcement of a cease and desist order relating to employer misconduct are not in conflict with the decision of the Court of Appeals in the instant case.[16]

In *National Labor Relations Board* v. *Metalab-Labcraft*, 367 F. 2d 471 (4th Cir. 1966), only one election was held which was duly certified by the Board. The unfair labor practices which the employer was seeking to have deemed moot as a result of a subsequent certification were not connected to the election campaign. Not only did some of the unfair labor practices involve violations of Section 8(a) (3) but even the 8(a) (1) violations were not found to be a basis for setting aside the election. Moreover, all of the unfair labor practices were too remote in time from the election to be regarded as having any connection with the representation case. The alleged violations of Sections 8(a)(1) and 8(a) (3) occurred during the period September 20-October 3, 1963, whereas the election was not held until January 24, 1964.

Although in *National Labor Relations Board* v. *Marsh Supermarkets, Inc.*, 327 F. 2d 109 (7th Cir. 1963), cert. denied 377 U.S. 944 (1964), the Section 8(a)(1) violation which the employer was contending was moot involved a

[16] In *General Electric Co.* v. *National Labor Relations Board*, 400 F. 2d 713, 717, footnote 2 (5th Cir. 1968), cert. den. 394 U.S. 904 (1969), the Court noted that the decision in *General Engineering* applied to preelection violations concerning "mainly the election." In *General Electric* the unfair labor practices were not deemed to have been rendered moot by a subsequent certification since the company's coercive activity occurred prior, during and after the October, 1963, election which was won by the union.

preelection speech, the Board's order was also based upon the fact that the same speech had been given to other employees who were not affected by the subsequent certified election. See *Marsh Supermarkets, Inc.*, 140 N.L.R.B. 899 (1963). Consequently, the Court in any event had to adjudicate the merits of the validity of the speech so that the violation the employer sought to have declared moot was cumulative and would not have affected the scope of the unfair labor practice order.

Finally, as noted above, one of the 8(a)(1) violations which the employer was contending had been rendered moot by a subsequent certified election in *National Labor Relations Board* v. *Clark Bros. Co., Inc.*, 163 F. 2d 373 (2d Cir. 1947) was the maintenance of an unlawful no-solicitation clause. Such a violation clearly has an independent effect apart from the representation case. One of the other two alleged violations in *Clark Bros.*, a finding of unlawful surveillance, might also be deemed to have an independent effect beyond the representation case.

National Labor Relations Board v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 (1938), involved a question of mootness raised before the Supreme Court rather than the Court of Appeals. In that case the fact that some, but not all, of the employees affected by the unfair labor practice had selected a bona fide union as their bargaining representative pursuant to Board certification, did not render moot an order directing the employer to dissolve a dominated labor organization. Under the facts of that case, such a decision is not inconsistent with the decision by the Court of Appeals in this case. As noted above, Section 8(a)(2) violations are not "related" to a representation case as the term was used in *General Engineering, Inc.* v. *National Labor Relations Board*, 311 F. 2d 570 (9th Cir. 1962).

Contrary to the position taken by the Court in *National Labor Relations Board* v. *Metalab-Labcraft*, 367 F. 2d 471 (4th Cir. 1966) and *National Labor Relations Board* v. *Marsh Supermarkets, Inc.*, 327 F. 2d 109 (7th Cir. 1963), the decision of the Ninth Circuit in this case and *General Engineering, Inc.* v. *National Labor Relations Board*, 311 F. 2d 570 (9th Cir. 1962) does not conflict with the general doctrine that compliance with a Board order does not render the order moot. *National Labor Relations Board* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563 (1950); *National Labor Relations Board* v. *Pool Manufacturing Co.*, 339 U.S. 577 (1950). In *Mexia*, this Court enunciated the principle that compliance with a Board order is no defense to the Board's petition for enforcement. This principle has been applied by the Ninth Circuit in such cases as *National Labor Relations Board* v. *Rippee*, 339 F. 2d 315 (9th Cir. 1964) and *National Labor Relations Board* v. *Oregon Worsted Co.*, 96 F. 2d 193 (9th Cir. 1938). The *Rippee* decision is particularly significant since two of the three judges participating in that per curiam decision which applied the *Mexia* principle to a violation of Section 8(a)(5) had participated in the earlier decision in *General Engineering, Inc.* v. *National Labor Relations Board*, 311 F. 2d 570 (9th Cir. 1962) and the third judge participated in the per curiam decision in this case.

The Board also cites several other cases arising outside the Act for the proposition that voluntary compliance with an administrative order is not a defense in an enforcement proceeding. *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37 (1944); *Gray* v. *Sanders*, 372 U.S. 368 (1963); *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290 (1897); *United States* v. *Concentrated Phosphate Export Association*, 393 U.S. 199 (1968); *Walling* v. *James V. Reuter, Inc.*, 321 U.S. 671 (1944). These cases are basically

inapplicable on their facts to the instant case.[17] None of them involved the National Labor Relations Act. None of them should constitute controlling precedent with respect to the instant case involving a unique set of circumstances arising in the context of representation and unfair labor practice proceedings under the Act.

Wirtz v. *Local 153 Glass Bottle Blowers Association*, 389 U.S. 463 (1968), cited on pages 8, 13 and 14 of the Board's brief, arose under Title IV of the Labor-Management Reporting and Disclosure Act which conferred on the Secretary of Labor authority to supervise elections of union officers. In holding that the Court of Appeals, Third Circuit, erroneously refused to enforce a District Court order requiring a new election under the supervision of the Secretary of Labor, this Court relied on express statutory language [18] supported by legislative history. In the instant case, Congress did not specifically provide in the Act that a Court of Appeals shall enforce a Board order on the basis of the Board's findings but that it "shall have power" to do so. It is apparent from the language of Section 10(e) that the question of whether to enforce a given order was reserved for decision by the Court of Appeals.

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[17] *Trans-Missouri* and *Concentrated Phosphate Export Association* were anti-trust cases in which the dissolved associations were not the only defendants against whom the Government sought injunctive relief. *Gray* v. *Sanders* involved the unconstitutionality of a state statute which continued in force despite the temporary abandonment of the specific practice enjoined. *Helmerich & Payne* and *James V. Reuter, Inc.* each involved violations of the Fair Labor Standards Act, in which the facts indicated a strong likelihood that the violations would resume, absent an injunction.

[18] Sec. 402 (c) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 534, 29 U.S.C. § 482 (c), provides that upon a finding that the Act has not been complied with, "the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary . . ."

d). The Court of Appeals Dismissal of the Board's Petition under the Particular Circumstances of this Case does Not Frustrate the Purpose of Section 7 of the Act.

As discussed above, the Court of Appeals had before it a record indicating that the alleged unfair labor practices were indigenous to the representation case and of a marginal nature. In addition, the Court had before it evidence that Raytheon was not a hard core anti-union employer. On page 10 of its brief the Board quoted from Raytheon's brief before the Ninth Circuit to the effect that between 1960 and 1966 Raytheon had been involved in 19 organizational campaigns. The Board omitted the balance of the paragraph in the brief which demonstrated Raytheon's fair and equitable conduct in its relationships with employees and their unions.[19] The Court of Appeals could properly consider such a background in determining whether adjudication of the unfair labor practice issues on the merits was warranted.

The argument that the decision of the Court below frustrates the purpose of Section 7 of the Act ignores realities of the actual situation in this case. The Court of Appeals could properly conclude that the setting aside of the earlier election and the holding of the new election under the particular circumstances present in this case sufficiently protected the right of the employees to continue future organizational efforts to the fullest extent. The Board is attempting to ignore the factual situation and by arguing

[19] "As of the date of the hearing Raytheon employees in Massachusetts, Connecticut, Rhode Island, and Oxnard and South San Francisco, California, were represented by unions and there had never been a strike by Raytheon employees (Tr. p. 236). Approximately nineteen petitions for elections have been filed at Raytheon plants during the period 1960-1966 and, prior to the instant case, no objections had been filed to Raytheon's preelection conduct (Tr. pp. 237-238)." (Raytheon Brief, 9th Cir. p. 4.)

in broad general terms, to create the impression that the decision of the Court below was in complete disregard of employee rights. The Court below, however, should not be regarded as establishing broad general rules to apply in a wide variety of cases of varying degrees of unfair labor practices, but was limiting its decision to the particular factual situation.

It is submitted that the Board is seriously overdramatizing the impact of the alleged unfair labor practices involved here upon future organizational activity of the employees. Its statement "unredressed unfair labor practices can cast a long shadow into the future" although impressive rhetoric has little relevance to the fact situation presented in this case. "But such speculative contingencies afford no basis for our passing on the substantive issues the appellants would have us decide . . ." *Hall* v. *Beals*, 90 S. Ct. 200, 202 (1969).

Conclusion.

For the foregoing reasons, the judgment of the Court of Appeals dismissing the Board's enforcement petition should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 440.—October Term, 1969

National Labor Relations Board, Petitioner, v. Raytheon Company et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May 18, 1970]

Opinion of the Court by Mr. Justice Marshall, announced by Mr. Justice Stewart.

This case was brought here on certiorari by the National Labor Relations Board for review of the dismissal of its petition for enforcement of a cease-and-desist order forbidding certain conduct of the Raytheon Company found to be in violation of § 8 (a)(1) of the National Labor Relations Act.

After it lost a representation election conducted by the Board on February 4, 1965, the International Union of Electrical, Radio and Machine Workers, AFL–CIO, filed objections to the election and unfair labor practice charges, both based on pre-election misconduct of the company. On October 19, 1965, an unfair labor practice complaint issued alleging violations of § 8 (a)(1). The proceedings on that charge were consolidated with the objections to the election case, and a hearing was held before a Trial Examiner. Thereafter, on October 5, 1966, the Board rendered its decision, ordering that a new election be held and that the company cease and desist certain antiunion activity.

On February 8, 1968, pursuant to § 10 (e) of the Act, the Board filed a petition in the Court of Appeals for the Ninth Circuit seeking enforcement of its unfair

labor practice orders. The company answered, urging that enforcement be denied on the merits and on the ground that the proceedings were moot because a second election had been held in the interim. After the case was briefed and argued on the merits, the company called to the attention of the court that yet a third election had been held and that this time the result (a majority vote for "no union") had been certified by the Board. The question whether this intervening election had mooted the case was briefed on all sides; and, on the authority of its earlier decision in *General Engineering, Inc.* v. *NLRB*, 311 F. 2d 570 (C. A. 9th Cir. 1962), the Court of Appeals dismissed the proceedings with a brief *per curiam*. 408 F. 2d 681 (C. A. 9th Cir. 1969). We granted certiorari, 396 U. S. 900 (1969), and we reverse.

As stated by the Court of Appeals, the ground upon which the petition was dismissed was "that since [it was] filed the Board has held a new representation election and certified the result." Thus, without more, the Court followed its decision in *General Engineering* that an intervening election "makes moot all portions of the order under review which relate to the representation case." 311 F. 2d, at 572. We cannot agree to the automatic effect accorded in *General Engineering* to a later valid election and rather find correct the decisions of the two circuits that have specifically refused to adopt the reasoning of that case. *NLRB* v. *Metalab-Laberaft*, 367 F. 2d 471 (C. A. 4th Cir. 1966); *NLRB* v. *Marsh Supermarkets, Inc.*, 327 F. 2d 109 (C. A. 7th Cir. 1963); cf. *NLRB* v. *Clark Bros.*, 163 F. 2d 373 (C. A. 2d Cir. 1947).

In *NLRB* v. *Mexia Textile Mills*, 339 U. S. 563, 567–568 (1950), this Court held:

> "We think it plain from the cases that the employer's compliance with an order of the Board does

> not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court. . . . A Board order imposes a continuing obligation; and the Board is entitled to have the resumption of the unfair practice barred by an enforcement decree. . . . The Act does not require the Board to play hide-and-seek with those guilty of unfair labor practices."

Properly viewed, this holding controls the present case. The later election and certification here is simply evidence that the company complied with the Board order during the pendency of the election. The Act, however, is not designed merely to protect a particular election or organizational campaign. It is designed to protect employees in the exercise of their organizational rights, and that protection cannot be affected merely because a particular labor organization has chosen an immediate election rerun rather than awaiting enforcement of the Board order.

Undoubtedly, as the Court recognized in *NLRB* v. *Jones & Laughlin Steel Co.*, 331 U. S. 416, 428 (1947), there are situations where an enforcement proceeding will become moot because a party can establish that "there is no reasonable expectation that the wrong will be repeated." *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953). But this is not such a case. Nothing in the record here shows that the specific acts complained of have not been repeated nor gives any assurance that they will not be repeated in the future. Cf. *United States* v. *Concentrated Phosphate Export Assn.*, 393 U. S. 199, 203 (1968); *Wirtz* v. *Local 153, Glass Blowers Assn.*, 389 U. S. 463, 474–475 (1968).

The Board, established by Congress with primary responsibility for the protection of the public interest in this area, see *NLRB* v. *J. H. Rutter-Rex Mfg. Co.*, 396 U. S. 258 (1969), has determined that the company en-

gaged in illegal activities and that a remedial order is called for. Under these circumstances, the employees cannot be denied the protection of the order (with the possible sanction of contempt proceedings for violations) in the absence of a decision on the merits. "[I]f the Board's order is justified, it is entitled to have it enforced as a means of insuring that in future elections the conduct may not be repeated." *NLRB* v. *Marsh Supermarkets, Inc., supra,* at 111.

In this Court, the company essentially admits that the judgment below cannot be "based on mootness in its classical sense" and instead attempts to support it on other grounds. Thus, the company says—and we agree—that it is the courts of appeals that are charged with the primary and usual responsibility for granting or denying enforcement of Board orders. *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474 (1951). From this proposition and the fact that the Court of Appeals had before it the entire record in the case, the company urges that the decision below "should be construed as a determination, in the exercise of the discretion vested in the Court by Section 10 (e) of the Act, that on the basis of all of the circumstances, including the subsequent certification, enforcement was inappropriate."

We need not pause to consider whether such a determination would have been proper on the facts of this case. The simple answer is that the Court of Appeals did not pass upon the merits of the Board's petition for enforcement. While the company is, of course, free to argue on remand either that there was no violation or that if there was it was so marginal as not to justify judicial enforcement or both, these questions are for the Court of Appeals in the first instance. We will not pass on how that court might have regarded the case had it not erroneously concluded that the election and certification mooted the proceedings.

The judgment of the Court of Appeals dismissing the petition for enforcement is reversed and the case is remanded for consideration of the petition on its merits.

It is so ordered.